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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JOSE ROBERTO CAÑAS-SEGOVIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The core of the Ninth Circuit's holding in this case is that aliens who face criminal sanctions for engaging in conduct for religious or political reasons qualify for asylum and withholding of deportation *even though* the criminal sanctions are the same for all who engage in the forbidden conduct and are not intended to discriminate on the basis of religious or political beliefs. The lower court reached this remarkable result notwithstanding the requirement in the Refugee Act of 1980 that applicants for asylum and withholding of deportation establish that they have a well-founded fear of persecution, or would likely be persecuted, "*on account of* race, religion, nationality,

membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A), 1253(h)(1) (emphasis added). The court asserted that "[n]either of these standards requires an asylum applicant to establish the persecutor's intent or motive." Pet. App. 17a. Instead, the court below reasoned that the *asylum applicant's* reasons for violating a law can establish persecution "on account of" religion or political opinion. *Id.* at 20a.

The Ninth Circuit's decision in this case squarely conflicts with the en banc Fourth Circuit's decision in *M.A. A26851062* v. *INS*, 899 F.2d 304 (1990), as well as decisions of the First and Eleventh Circuits holding that the "on account of" language of the Refugee Act requires proof of the persecutor's intent. The Ninth Circuit's reasoning reflects a profound misunderstanding of the nature of persecution and thus of the structure of the governing statute. It is the *persecutor* who threatens to inflict harm. Thus, only the persecutor's state of mind is relevant to determining whether a threat is "on account of * * * religion * * * or political opinion." Even if limited to the context of military conscription, the lower court's substitution of the applicant's motive (for engaging in conduct) for that of the alleged persecutor (in threatening harm) would bestow refugee status on every draft resister who refuses to serve "on account of" his religious or political beliefs, regardless of the government's reasons for requiring military service and for refusing to make an exception in his case.

Although respondents labor mightily to reconcile the Ninth Circuit's analysis with the Refugee Act, Br. in Opp. 8-18, most of that discussion does not require a response at this stage, since it is directed to

the merits of the underlying dispute rather than to the question whether the petition should be granted.[1]

1. Respondents fail in their efforts to reconcile the Ninth Circuit's decision in this case with the en banc Fourth Circuit's decision in *M.A.* Br. in Opp. 18-20. The first proposed distinction, *id.* at 18—that M.A.'s asylum claim was made in his motion to reopen his deportation proceeding, 899 F.2d at 307—is entirely

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[1] Two brief observations are appropriate, however. First, respondents rely heavily on the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), published by the United Nations High Commissioner for Refugees. See Br. in Opp. 3-5, 11-13. But since respondents concede that the *Handbook* provides at most "significant guidance," Br. in Opp. 3, in construing the Refugee Act, respondents seem to agree with the government that the Ninth Circuit erred in giving "authoritative" weight to the *Handbook*. Pet. App. 13a. Respondents also appear to concede that the *Handbook*'s author, the High Commissioner for Refugees, has taken inconsistent positions on the eligibility of conscientious objectors for refugee status based solely on failure to comply with universal conscription laws. Respondents claim that the High Commissioner's latest position, which differs from her position in 1982, see Pet. 22-23, returns to the one she espoused in 1981, Br. in Opp. 12 n.6. If so, the High Commissioner has switched sides not once, but twice. Thus, by respondents' own analysis, *id.* at 15-18, the High Commissioner's views provide little guidance in interpreting the Refugee Act. More fundamentally, the High Commissioner's latest position on conscientious objectors conflicts with other paragraphs of the *Handbook*, which recognize (correctly) that "[i]f the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee." *Handbook* ¶ 84; *see id.* ¶ 56.

Second, respondents err in claiming, Br. in Opp. 16 n.12, that the agency's construction of the Refugee Act is not entitled to deference. This Court has held that the traditional deference rules apply. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

irrelevant; indeed, respondents do not even attempt to explain what difference it makes. As we note in our petition, Pet. 17 n.9, the Fourth Circuit reviewed the Board of Immigration Appeals' denial of M.A.'s motion based on his "failure to establish prima facie eligibility" for relief. 899 F.2d at 308. Since the question in *M.A.*, as here, is not the likelihood of punishment, but whether it is "on account of" religion or political opinion, the procedural posture of the two cases cannot explain the difference in results.

The second proposed distinction is that respondents are religious conscientious objectors, while M.A. was a political conscientious objector. Br. in Opp. 18-19. Again, however, respondents fail to identify the principle that explains why religious conscientious objectors deserve asylum and political conscientious objectors do not. As we note in our petition, there is no such principle.[2] In any event, the Ninth Circuit held that *all* conscientious objectors are eligible for asylum as long as their refusal to serve "is based upon genuine *political*, religious, or *moral* convictions, or *other genuine reasons of conscience*." Pet. App. 16a (emphases added). Another Ninth Circuit panel has recognized the breadth of the decision below. *Barraza Rivera* v. *INS*, 913 F.2d 1443, 1450-1451 (1990)

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[2] See *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in result) (Congress "cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other"); Cohen & Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. Pitt. L. Rev. 389, 403 (1968) ("Nothing is more repugnant to a sense of fairness than the rejection of the claim of a conscientious objector because he does not believe in a transcendent reality."); Mansfield, *Conscientious Objection—1964 Term*, 1965 Relig. & Pub. Ord. 3, 76 ("[T]here are really no convincing reasons why the religious objector should be exempt and not the non-religious conscientious objector.").

(the decision below "defined conscientious objector in the asylum context broadly," beyond the "traditional form of conscientious objection" based on "religious grounds").

The third proposed distinction is the lower court's suggestion, Pet. App. 22a, that respondents presented evidence that they would be tortured and killed while M.A. did not. Br. in Opp. 20. To repeat, however, the question in these cases is not the likelihood—or severity—of harm, but whether it is "on account of" religion or political opinion.[3] On the latter point, respondents' evidence was no better than M.A.'s. In fact, one of the respondents candidly admitted: "I don't think they would care about what my religious beliefs were. What they care about is [whether] they can pick up people for fighting." Pet. App. 35a (brackets in original). The Ninth Circuit held that respondents' status as conscientious objectors, without more, satisfied the statutory "on account of" language; the en banc Fourth Circuit held that it did not.[4] The conflict between the two circuits could not be more direct.

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[3] For this reason, the *Handbook*'s recommendation (¶ 169) of refugee status for "a deserter or draft evader" subject to disproportionate punishment has no bearing on this case. Like the Refugee Act, that paragraph focuses on whether the punishment is "on account of" race, religion, nationality, membership in a particular social group or political opinion—*i.e.*, "above and beyond the punishment for desertion" or draft evasion. Pet. App. 64a (reprinting *Handbook* ¶ 169). The Ninth Circuit found the punishment to be "disproportionate" *not* because Jehovah's Witnesses receive a more severe penalty than other draft resisters, but because they would suffer more if (contrary to their convictions) they took up arms rather than went to jail. Pet. App. 22a-23a.

[4] As a factual matter, the Ninth Circuit was wrong to assert that respondents faced a more serious threat than did M.A. M.A. offered evidence that he had been threatened by a

2. The Ninth Circuit also held that conscientious objection to military service constitutes an "expression of political neutrality." Pet. App. 23a. Respondents contend that this holding is "non-essential to the Ninth Circuit's decision." Br. in Opp. 21. In one sense, respondents are correct. The Ninth Circuit's alternative holding simply seeks to convert conscientious objection (whatever the reason) from a basis of religious persecution to a basis for political persecution. It is therefore vulnerable on precisely the same ground as the principal holding. See Pet. 22.

At the same time, the Ninth Circuit's alternative holding obliterates any basis for distinguishing religious from political conscientious objectors (if *religious* conscientious objection constitutes a *political* opinion of neutrality, it follows that *political* conscientious objection must as well). It also brings the Ninth Circuit into conflict with the First and Eleventh Circuits, both of which hold that the Refugee Act requires proof of the persecutor's intent to discriminate "on account of" political opinion. See Pet. 16 & n.8. To that charge, respondents say only that "[i]t is questionable" whether the decisions conflict. Br. in Opp. 21. Not so. The Eleventh Circuit held that "the motivation of the persecutor becomes the linchpin of the analysis," *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292, 1299 (1990) (per curiam), and the First Circuit noted that, in view of the conflict between the analysis of the Eleventh Circuit and that of the court below, the Ninth and Eleventh Circuits "appear divided on the issue" whether "persecution on account of political neutrality requires that the intention of the *persecutor* be

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civilian patrol and had been twice beaten by soldiers. 899 F.2d at 306. Respondents entered the United States before they reached the age of conscription, and the Salvadoran government was not even aware they were Jehovah's Witnesses.

the 'linch-pin' of the analysis," *Alvarez-Flores* v. *INS*, 909 F.2d 1, 8 n.6 (1990).[5] By holding that the Refugee Act does not require respondents "to demonstrate motive or intent to persecute on the part of the Salvadoran government," Pet. App. 17a, the Ninth Circuit put its ship "at some distance from the main fleet." *Mendoza-Perez* v. *INS*, 902 F.2d 760, 768 (9th Cir. 1990) (Sneed, J., concurring).

3. The Ninth Circuit's misreading of the statutory "on account of" language is not simply unfaithful to the Refugee Act, it also poses a severe administrative burden for the adjudication of asylum cases. By holding that the applicant's reasons for engaging in criminal conduct can establish that imposition of the corresponding penalties are "on account of * * * religion * * * or political opinion," the Ninth Circuit has made any "conscientious objector" to military conscription eligible for asylum and withholding of

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[5] Contrary to respondents' contention, Br. in Opp. 22 n.15, the First Circuit in *Umanzor-Alvarado* v. *INS*, 896 F.2d 14, 15 (1990), did *not* suggest that conscientious objectors are eligible for asylum. Judge Breyer wrote that evidence "that the Government may punish simply because [the applicant] will not serve" in the military "does not show that the Government will *persecute* him because of his *political opinion*." *Ibid.* Not only do respondents elide Judge Breyer's emphases, Br. in Opp. 21-22 n.15, but they err in trying to draw comfort from the statement in another paragraph that "the matter might well be different" if the applicant were a genuine pacifist. *Ibid.* The earlier sentence, as well as a later opinion by Judge Breyer, establish that the matter would *not* be different in the First Circuit. See *Novoa-Umania* v. *INS*, 896 F.2d 1, 3 (1990) (claim of persecution based on political neutrality requires proof of *persecutor's* intent in one of three forms). The sentence quoted by respondents simply paraphrases the Ninth Circuit case cited immediately thereafter; we agree that in the Ninth Circuit "the matter might well be different."

deportation. Given the number of draft-age males in countries like El Salvador, and the "incentives for draft-age males to raise asylum claims," *M.A. A26851062* v. *INS*, 899 F.2d at 315, it is not unreasonable to expect a flood of such claims from those placed in deportation proceedings in the Ninth Circuit Moreover, by making eligibility for asylum turn on the applicant's reasons for draft evasion, the Ninth Circuit has propounded an interpretation of the Refugee Act that is peculiarly susceptible to manipulation and abuse.

Respondents insist that the court below ruled only that two Jehovah's Witnesses were refugees under the Refugee Act. Br. in Opp. 23. Respondents were more candid in their opposition to our petition for rehearing en banc, where they brushed aside the "floodgate argument" with the response that the court should adopt their view of the Refugee Act "irrespective" of its "effect on potential numbers of successful claims." Resp. C.A. Reply 1 n.1.

For the foregoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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